







# In the Supreme Court of the United States

OCTOBER TERM, 1938

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No. 22

THE UNITED STATES OF AMERICA, PETITIONER

v.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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REPLY TO RESPONDENTS' MOTION TO DISMISS

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The petition for a writ of certiorari herein was filed April 5, 1938. The brief of respondents in opposition was filed April 28, 1938. In that brief counsel for the respondents sought to influence the Court to deny the writ by asserting that he was appearing only as counsel for the Continental National Bank & Trust Company of Chicago in its capacity as trustee under the trust created under Item 3 of James Duggan's will (R. 7) for the benefit of Timothy Duggan and his children. In that

brief the death of Henry Duggan on October 16, 1937, was suggested, and it was confidently asserted (Br. 1) that his death removed Henry Duggan and the trust created by Item 6 of James Duggan's will (R. 6) from the case.

Notwithstanding these facts, this Court granted the writ on May 16, 1938, in no wise limiting its scope as to parties involved. Petitioner's brief on the merits was thereafter filed on September 27, 1938, from which it appears that the death of Henry Duggan did not automatically eliminate the Continental National Bank & Trust Company as trustee under Item 6 of James Duggan's will from the case (Br. 38-42). This now appears to be conceded by the Bank. See Brief in Support of Motion to Dismiss, page 8.

On October 10, 1938, the Continental National Bank & Trust Company, purporting to appear specially, moved to dismiss the writ of certiorari as to the Continental National Bank & Trust Company as trustee under Item 6 of James Duggan's will. An affidavit attached to that motion disclosed for the first time the additional fact that on April 6, 1938, the day after the petition for a writ of certiorari was filed, the Bank physically paid over, transferred, and delivered the corpus of the trust held by it under Item 6 to the Continental Illinois National Bank & Trust Company,<sup>1</sup> another national

<sup>1</sup> The records of the Comptroller of the Currency of the United States disclose that on February 27, 1929, the Continental Illinois National Bank & Trust Company (at that time

banking institution located in Chicago.<sup>2</sup> This transfer is stated to have been without notice that a petition had been filed, but the Bank was given notice at least on April 1, 1938, when the motion to recall the mandate, for substitution, and for an order preventing distribution of the funds, was filed in the court below, that a petition would be filed.

This additional fact, in view of other circumstances of the case, furnishes no reason for dismissal, and the motion should be denied.

Both in the affidavit attached to its motion, pages 4-5, and in its brief in support thereof, page 8, it is asserted that upon the death of Henry Duggan on October 16, 1937, the title to the corpus of the trust passed immediately by operation of law to the trustee appointed by the will of Henry Duggan.

1. There is no authority for this assertion. The only case cited by respondents, *Anderson v. Messenger*, 146 Fed. 929 (C. C. A. 6th) (Br. 8), does

a state bank but later converted into a national bank) purchased all the assets of the Continental National Bank & Trust Company, except its trusts and trust properties and \$1,800,000 retained on account of reduced capital and surplus, in exchange for shares of its own stock, that it now owns all of the capital stock of the latter except directors' qualifying shares, and that all of the banking business is conducted in its name.

<sup>2</sup> The transfer purportedly was made pursuant to the provisions of Henry Duggan's will, in which he exercised the power of appointment given by Item 8 of James Duggan's will and directed that the corpus of the trust be paid over to the latter bank as trustee, subject to certain trusts.

not support this bald proposition, but if it did it would not be determinative here so long as the custody of the trust corpus did not change.

2. Unquestionably the legal and equitable rights of the beneficiaries under the power of appointment exercised by Henry Duggan became fixed when he died. That, however, does not justify or excuse ignoring the rights of the United States. The Bank held property which it received from the estate of James Duggan. In so far as the present action is concerned, that property was held in trust for the benefit of the United States to the extent of its claim here involved. See *Field v. United States*, 9 Pet. 182; *Lewis v. United States*, 92 U. S. 618; *Bayne v. United States*, 93 U. S. 642; *United States v. Carter*, 217 U. S. 286; *United States v. Barnes*, 31 Fed. 705 (C. C. S. D. N. Y.); *United States v. Dewey*, 39 Fed. 251 (C. C. S. D. N. Y.). Regardless of any duties the Bank may have had with respect to that part of the property subject to appointment by Henry Duggan, its duties as trustee for the benefit of the United States did not terminate with the death of Henry Duggan.

It is not shown that transfer of the property held under Item 6 of James Duggan's will was made pursuant to an order of any court of competent jurisdiction, or that the Continental National Bank & Trust Company has made an accounting or settlement which can operate as a discharge from its liability as trustee. The contrary is to be inferred from the statement in the brief in support of its



motion, page 10, that it was not necessary to obtain any order of distribution from any state court. Compare *Fletcher v. Commissioner*, 29 B. T. A. 503.

3. The jurisdiction of this Court to pass upon the questions brought before the Court by the writ of certiorari is not, and could not be, challenged. The mere assertion that the property held in trust at the time the petition for a writ of certiorari was filed has since been paid over to another bank does not justify dismissal of the writ. A trustee's liability to a beneficiary is not discharged in this summary manner. Furthermore, it is not claimed that the transfer of trust property has rendered the trustee insolvent, or otherwise immune from a judgment obtained against it in this proceeding. In this connection, it is to be noted that if the transfer was invalid, or was made in fraud of the rights of the United States, there remains a possibility that it can be set aside in an appropriate proceeding. While the *bona fides* of the transfer cannot yet be directly challenged, the relationship of the parties and the time and circumstances of the transfer are by no means reassuring.<sup>3</sup>

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<sup>3</sup> Upon receipt of the Bank's motion to dismiss, the Internal Revenue Agent in Charge at Chicago was directed to procure detailed information with respect to the extent and nature of the transfer, and authority therefor, but we are informed that both the Continental National Bank & Trust Company and the Continental Illinois Bank & Trust Company refused to divulge any facts in the absence of a court order directing them to do so. The limited time did not permit resort to such procedure.



4. Respondent argues in support of its motion to dismiss (Br. 8) that when a new trustee receives the trust *res* any action pending at the time against the former trustee "can no longer be prosecuted against the new trustee, and, in this case, the new beneficiaries." The principles of law approved in the decisions cited do not support this statement. All of the cases cited fully recognize the right of a fiduciary, who becomes the successor in interest of the fiduciary originally appearing, after succeeding to the title of his predecessor, to be substituted in the proceeding and prosecute or defend the action with the same rights and liabilities as the predecessor fiduciary.

Under the rule of law recognized in these and numerous other cases, if the property previously held in trust by the Continental National Bank & Trust Company has actually been transferred as alleged, the Continental Illinois National Bank & Trust Company becomes a successor trustee in so far as the trust in favor of the United States is concerned, and can properly appear and defend the present action in that capacity.

Moreover, the respondent was sued as a trustee holding property for the benefit of the United States. As pointed out above, it is not shown that by the mere transfer of that property it has relieved itself of that liability.

No Illinois cases are cited which support the contention that a trustee in the circumstances disclosed here is removed from the case. Section 54

of the Illinois Practice Act (Jones Illinois Statutes, annotated, Vol. 18, p. 249, ch. 104.054) provides that an action may be continued against the original party even after a transfer of the property. Rule 25 (c) of the new Rules of Civil Procedure, recently promulgated by this Court for the District Courts of the United States, has a similar provision.

The transfer in question was made five days after notice that the United States would file a petition for a writ of certiorari, and without notice to the Government. No mention was made of it in the brief in opposition. Orderly administration of justice requires, at the least, that a party not be allowed to take himself out of the jurisdiction of this Court.

#### CONCLUSION

In view of all the circumstances, the motion to dismiss should be denied.

Respectfully submitted.

ROBERT H. JACKSON,  
*Solicitor General.*

OCTOBER 1938.